IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NAVIANT MARKETING SOLUTIONS, INC.,	:	CIVIL ACTION NO. 00-6036
Plaintiff,	:	
v.	:	
LARRY TUCKER, INC.,	:	
Defendant.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. JANUARY 4, 2002

In this breach of contract action, plaintiff, Naviant Marketing Solutions, Inc. ("Naviant") seeks payment allegedly due and owed by defendant Larry Tucker, Inc. ("Tucker"), in connection with the delivery of various mailing lists by Naviant to Tucker, pursuant to two written contracts, dated April 26, 1999 and January 24, 2000.

Naviant is in the business of furnishing lists of names and addresses to direct mail advertisers. Tucker is a direct mail advertiser who circulates advertisements nationwide on behalf of commercial clients, targeting various demographic groups. Pursuant to the two contracts, Naviant delivered to Tucker's data processing vendor, Cornwell Data Services, Inc. ("Cornwell"), lists of names and addresses in connection with four separate mailings by Tucker. Tucker paid in full the invoices for the first two mailings (the July 1999 and October 1999 mailings). However, Tucker has refused to pay three invoices for lists of names provided by Naviant to

Tucker for Tucker's January 2000 and March 2000 mailings. Naviant seeks the amount of the unpaid invoices from Tucker as well as all prejudgment interest from the date of each invoice. Tucker maintains that it is not obligated to pay Naviant the invoiced amounts because Naviant materially breached the contract by defectively and deficiently performing its duties under the two contracts.[1]

The Court finds that Naviant has performed its duties under the contracts except as to timely delivery of a portion of the March 2000 mailing lists. However, because the court finds that Tucker waived its right to timely delivery, Naviant is entitled to received the invoiced payments owed by Tucker to Naviant pursuant to the contracts.[2]

I. FACTS

Naviant is engaged in the business of providing mailing lists to its customers.[3] Tucker, a direct mail marketer, acquires

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1. Tucker also asserts counterclaims but those have been severed from Naviant's case-in-chief by this Court as a sanction. Contentious discovery in this case led the court to enter various sanctions against Tucker, including severing Tucker's counterclaims and striking its affirmative defenses. See July 25, 2001 Order (doc. no. 46); October 2, 2001 Order (doc. no. 74).

2. Pursuant to Fed R. Civ. P. 52(a), this memorandum constitutes the court's findings of fact and conclusions of law.

3. The original contracts at issue here were negotiated between and entered into by Tucker and a company called IMPCO Enterprises, Inc. On or about February 18, 2001, Naviant acquired and merged IMPCO into Naviant Marketing Solutions, Inc., (continued...)

lists of names such as those provided by Naviant and uses the lists for direct mail advertisements on behalf of its customers. Tucker's mailings are primarily demographically targeted to young parents with children under seven years of age. On or about April 26, 1999, Tucker entered into a written contract ("Young Families Contract") with Naviant. Under the terms of the contract, Tucker would rent from Naviant a list of names and addresses for Tucker's use in mass mailings on behalf of Tucker's customers. The price for the list to be paid by Tucker was based upon volume usage by Tucker. "Volume" is defined in the Young Families Contract as "the number of names used and 'in the mail'". Naviant agreed to invoice Tucker at a price of seven dollars per one thousand names used by Tucker.[4] The Young Families Contract does not contain any terms or conditions as to the minimum or maximum NCOA rate,[5] the minimum or maximum keep rate, or the minimum or maximum duplication rate of the names to be supplied to Tucker. Nor did the Young Families Contract contain a term or condition as to the minimum

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3. (...continued)
thereby acquiring the rights and obligations under the two contacts at issue in this litigation. IMPCO, therefore, is referred to herein as "Naviant".

4. This rate was based upon an annual commitment of a purchase by Tucker of twenty-five million names per year. If, within twelve months, Tucker's orders of names did not meet the twenty-five million minimum in quantity, Naviant would adjust the invoice upward to reflect pricing based upon actual number of mailings by Tucker.

5. The NCOA rate is a comparison between the lists provided to Tucker and an NCOA list prepared by the United States Postal Service and updated on a biweekly basis, tracking changes in names and addresses of the public.

number of unique names to be supplied to Tucker. Furthermore, the Young Families Contract did not provide a specific date by which Naviant must deliver the ordered lists.[6]

In or about mid-November 1999, Tucker placed an order with Naviant for 9.6 million names from Naviant's "Young Families" list for Tucker's January 2000 mailing. Naviant was to forward the list to Cornwell, Tucker's data processor. Pursuant to the Young Families Contract and the November 1999 order, Naviant delivered tapes containing approximately 9.6 million names to Cornwell. Of these, Cornwell, on behalf of Tucker, processed the names on the tapes and caused 4,490,301 of the names to be put in the mail.[7] Following Tucker's use of the January 2000 "Young Families" list, Naviant forwarded an invoice in the amount of $31,457.11 to Tucker on or about December 31, 1999.[8]

In or about mid-January 2000, Tucker placed an additional order for approximately 9.8 million names from Naviant's "Young Families" list for Tucker's March 2000 mailing. Pursuant to this order, Naviant forwarded approximately 12.3 million names to

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6. The only provision of the Young Families Contract which speaks to timing of delivery states as follows: "We expect turnaround time of about 7 business days for delivery of names to Tucker after a list order is made."

7. The difference between the number of names provided by Naviant to Tucker and the number of names used by Tucker is the result of a "merge-purge" process which removes duplicated names from the list as well as an "NCOA" process which deletes incorrect information based on a current list kept by the United States Postal Service.

8. The invoiced amount was for the 4,490,301 names used by Tucker at a rate of $7/1,000 names used.

Cornwell on or about February 23, 2000. Of these, Cornwell, on behalf of Tucker, processed the names and caused 6,763,207 of the names to be put in the mail. Naviant forwarded an invoice reflecting a charge of $47,342.45 for the use of the March 2000 "Young Families" list.[9]

To date, Tucker has refused to pay the total invoiced amount of $78,799.56 to Naviant for use of the "Young Families" list, pursuant to the terms of the Young Families Contract.

Furthermore, in or about mid-December 1999, Tucker orally requested Naviant to obtain (i.e. broker) a list of names known as the "post natal file," owned by a separate corporation, Experian, Inc. Tucker requested 3.6 million names from this file. Naviant orally agreed to obtain said list. On January 19, 2000, Naviant sent a "Letter Agreement" to Tucker detailing the terms of the "post natal file" contract between Tucker and Naviant. Tucker's agreement to the terms of the letter is evidenced by the counter-signature of Tucker's President, Larry Tucker, on the Letter Agreement, dated January 24, 2000. According to the Letter Agreement, Naviant agreed to order one use of the file for Tucker's use in exchange for Tucker's payment to Naviant. Naviant would forward the file to Cornwell as soon as an advanced partial payment from Tucker was received by Naviant. Naviant's rate for the "post natal file" was dependent upon the volume of actual addresses used and mailed by Tucker, as follows: if Tucker mailed over one million

9. The invoiced amount was for the 6,763,207 names used by Tucker at a rate of $7/1,000 names used.

pieces, the rate was $38.50 per 1,000 names; if Tucker mailed under one million pieces, the rate was $48.50 per 1,000 names.[10] In addition, the Letter Agreement states that Naviant expected that the post natal file received from Experian would be pulled from records which would provide "only 0-24 month old post natal records."[11] Furthermore, in the Letter Agreement, Tucker agreed to guaranteed usage of 65% of the names provided in the post natal file.[12] The letter agreement contains no minimum rate of duplication within the post natal file.

On or about February 17, 2000, Tucker sent a check to Naviant of $46,123 as the front payment for the post natal list. On or about February 23, 2000, Naviant sent the post natal list containing 3.6 million names to Cornwell. Cornwell subsequently utilized the list and caused 905,922 items to be mailed for, and on behalf of, Tucker. Naviant seeks a balance of $71,689.00 from Tucker for the post natal file, which Tucker has failed and refused to tender.

Pursuant to both contracts, Naviant seeks to recover from Tucker a total of $150,488.56. After a long and contentious

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10. The price of the post natal file was substantially higher than the Naviant "Young Families" list because the post natal file was a more specialized list, containing names of families with very young children.

11. I.e. names of families with children between 0-24 months.

12. Thus, if Tucker used less than 65% of the post natal file, it would still be responsible for 65% of the names in the file. If Tucker used more than 65%, it would be responsible for the larger amount.

period of discovery, a two-day non-jury trial was held on plaintiff's breach of contract claims.

II. CONCLUSIONS OF LAW

Naviant has fully performed all of its obligations under both the Young Families Contract and the Letter Agreement except as to timely delivery of the March 2000 mailing of the "Young Families" list. To the extent that Naviant breached the Young Families Contract by late delivery of the March 2000 list, Tucker waived its right to timely performance by accepting delivery after the expected delivery date. Given that Naviant has fully performed and when it failed to timely perform under the Young Families Contract, timely performance was waived by Tucker, Naviant is entitled to payment from Tucker for the services it rendered pursuant to the terms of the contracts.

III. DISCUSSION

1. Choice of Law

Naviant asserts that Pennsylvania law should be applied to this contract dispute; Tucker argues that either New York or New Jersey law applies. A court sitting in diversity must apply the choice of law principles of the forum state in determining which state's law will govern the substantive issues in the case. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); Kirschbaum, et al. v. WRGB Associates, et al., 243 F.3d 145, 150-51 (3d Cir. 2001); LeJeune v. Bliss Salem, Inc., 85 F.3d 1069, 1070 (3d Cir. 1996).

Before a choice of law question arises, there must actually be a conflict among the potentially applicable bodies of law. See On Air Entertainment Corp. v. National Indemnity Co., 210 F.3d 146, 149 (3d Cir. 2000). Although the parties argue for the application of the law of different states, they have not pointed to any substantive difference between the laws of Pennsylvania, New York or New Jersey.[13] Nor has the court's own research identified any relevant differences. The outcome of this lawsuit, therefore, would be the same under either Pennsylvania, New York or New Jersey law. Since under these circumstances there is no conflict of laws, the court will avoid the choice of law issue and interchangeably refer to the relevant jurisprudence of the different states in discussing the law governing this breach of contract action. See On Air Entertainment, 210 F.3d at 149; Lucker Mfg. v. Home Ins. Co., 23 F.3d 808, 813 (3d Cir. 1994).[14]

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13. The parties assert that there is a conflict between Pennsylvania and New York and New Jersey law on the doctrine of substantial performance. However, because the court finds that the doctrine of substantial performance is not an issue in this case, the conflict is not relevant.

14. Some Third Circuit cases have referred to the situation where there is no difference between the law of two or more jurisdictions as a "false conflict". See, e.g., Lucker, 23 F.3d at 813; In re Complaint of Bankers Trust Co., 752 F.2d 874, 882 (3d Cir. 1984). The use of the term "false conflict" in that sense is not entirely correct. The concept of "false conflict" is derived from the scholarship of Professor Brainerd Currie. See Brainerd Currie, Selected Essays on the Conflict of Laws 189 (1963). Professor Currie defined a false conflict in the following manner: "[w]hen one of two states related to a case has a legitimate interest in the application of its laws and policy and the other state has none, there is no real problem; clearly the law of the interested state should be applied." Id. Thus, a (continued...)

2. Plaintiff's Breach of Contract Claim[15]

In an action for breach of contract, plaintiff must show: 1) the terms of an existing contract, including good consideration; 2) performance upon the part of the plaintiff; 3) breach by the defendant; and 4) the damages sustained thereby. See 22A N.Y. Jur. 2d Contracts § 432 (1996). As to each of the contracts, Naviant has shown that there is a valid contract, that Tucker has failed to tender payments in accordance with the contract, and that Naviant has sustained damages as a result. The only issue remaining in this case is whether Naviant performed its obligations under the contracts. Naviant has the burden of proof to show performance. See Otis Elevator Co. v. Flanders Realty Co., 244 Pa. 186, 188 (1914); Kaplan v. Wilson, 91 Pa. Super. 524 (1927). Cf. Ott v. Buehler Lumber Co., 373 Pa. Super. 515, 518 (1988) ("a party who has materially breached a contract may not complain if the other party refuses to perform his obligations under the contract.").

Tucker alleges that Naviant did not perform its duties under the contracts in three ways: 1) Naviant did not provide Tucker with a sufficient quantity of names ordered, net of

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14. (...continued)
"false conflict" arises not where there are no relevant differences in the laws of the two jurisdictions but rather, when there are relevant differences but the court may apply the law of one jurisdiction without affecting the governmental interests of the other jurisdiction. Austin v. Dionne, 909 F. Supp. 271, 274 n.1 (E.D. Pa. 1995).

15. The parties agree that the contracts at issue are contracts for services and not for the sale of goods.

duplication, in accordance with both the Young Families Contract and the Letter Agreement; 2) Naviant did not timely deliver the names for the March 2000 mailing, in accordance with the Young Families Contract; and 3) the quality of the names provided in the post natal file did not meet the specifications of the Letter Agreement.

a) The Quantity of Names.

There is no question that a large number of the names supplied by Naviant to Tucker were duplicates. Tucker claims that by providing a large number of duplicate names, Naviant breached the contracts. Naviant says that it had no duty to provide non-duplicative names and that Tucker is only responsible to pay for the names it actually used. Therefore, it is irrelevant whether the names were duplicates because Tucker was not obligated to pay for the names it did not use. The issue here is whether Naviant or Tucker assumed the risk of duplication of the names requested by Tucker and provided by Naviant.

The paramount goal of contract interpretation of a written contract, as in this case, is to determine "what is the intention of the parties as derived from the language employed." Hartford Acc. & Indem. Co. v. Wesolowski, 22 N.Y.2d 169, 171-72 (1973) (quoting 4 Williston, Contracts 3d ed., § 600, p. 280). See also Steuart v. McChesney, 498 Pa. 45 (1982).[16] Where the meaning

16. "When an ambiguity exists in the agreement, the problem is (continued...)

of a contract is clear and unambiguous, the court must assign the plain and ordinary meaning to each term and interpret the contract without the aid of extrinsic evidence. Alexander & Alexander Services, Inc. v. These Certain Underwrites at Lloyd's, London, 136 F.3d 82, 86 (2nd Cir. 1998) (applying New York law). If the contract's terms are unclear and susceptible to more than one reasonable interpretation, the court may look to extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract. Id.[17]

Here, the language in the contracts is clear and unambiguous on the issue of quantity and only susceptible to one reasonable interpretation: that Naviant did not have a duty to screen for duplicate names and to provide only non-duplicative names to Tucker. The contracts simply state that Naviant is to provide Tucker with the lists containing the number of names ordered. See Young Families Contract, Pl.'s Ex. 1, at 2 ("[Naviant] will provide names for each of the three mailings.");

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16. (...continued)
one of interpretation. If, however, the terms are clear, construction of the contract determines its legal operation." Garden State Tanning, Inc. v. Mitchell Manufacturing Group, Inc., No. 00-2432, at 5 (3d Cir. November 23, 2001) (citing Ram Construction Co., Inc. v. American States Insurance Co., 749 F.2d 1049, 1052-53 (3d Cir. 1984)).

17. In determining whether there is an ambiguity in a contract, "a court should determine whether the type of extrinsic evidence offered could be used to support a reasonable alternative interpretation. . . ." Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 94 (3d Cir. 2001). However, in this case, no extrinsic evidence was offered to support an alternative interpretation of the contract than which is discussed herein.

Letter Agreement, Pl.'s Ex. 6, at 1 (Naviant will attempt to "obtain [on Tucker's behalf] the specialty file known as the Metromail 'post natal' file."). Neither the Young Families Contract nor the Letter Agreement contain any language indicating that Naviant was required to cull through the names it provided to Tucker to avoid duplicates. Nor do the contracts contain any guarantees on the part of Naviant regarding minimum or maximum duplication rates. In the absence of language imposing upon Naviant the duty to provide non-duplicative names, the court will not rewrite a contract between sophisticated parties in order to do so.

Other provisions of both contracts are consistent with this interpretation. Namely, by predicating the amount of the payment on the number of names used and placed in the mail by Tucker, and not on the total number of names provided, both contracts anticipate that the number of names ordered by Tucker and supplied by Naviant, the gross number, would differ from the number of names which Tucker would use and for which it would ultimately be responsible, the net number. This is why the contracts provide that Tucker is only responsible to pay for the number of names it actually used.[18] If Naviant had the burden of insuring that all of

18. In the Letter Agreement, Tucker guaranteed its usage at 65%; that is, Tucker agreed to pay for 65% of the names in the "post-natal file", even if it used less than 65% of the names delivered. However, despite this guarantee, the agreement clearly evinces an intent between the parties that the number of names ordered and delivered differed from the number of names used and for which Tucker would have to pay.

the names be usable and unique, these provisions of the contracts would be superfluous. Therefore, Tucker bore the risk of duplication, and Naviant's obligations were limited to providing the gross number of names requested by Tucker.[19]

b) Timely performance.

The next dispute concerns the timeliness of Naviant's performance under the Young Families Contract. Specifically, Tucker claims that Naviant provided the list of "Young Families" names for the March 2000 mailing in an untimely manner in breach of the Young Families Contract.[20] The Young Families Contract

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19. With respect to the January 24, 2000 Letter Agreement, Tucker claims that it was persuaded to enter said contract based on the results of a test done in Massachusetts which estimated a non-duplication rate of approximately 80% for the post natal file. However, the results of this test are not dispositive here. First, the source of the names used in the Massachusetts test is unclear. Secondly, the test is a limited sampling without any statistical significance and not indicative of the level of duplication on a larger scale. Tucker's president, Larry Tucker, is an experienced businessman. His reliance on the Massachusetts test may have been a miscalculation or misjudgment on his part, but it was not a breach on the part of plaintiff.

20. Tucker also maintains that Naviant breached the Letter Agreement due to its untimely delivery of the post natal file. However, this argument is completely without merit. The letter agreement, unlike the Young Families Contract, does not contain any provision regarding the timing by which Naviant should deliver the post natal file to Cornwell. In fact, the Letter Agreement states that delivery of the post natal file would not be executed until the advanced payment from Tucker cleared into Naviant's account. The evidence shows that despite the fact that the order was placed in mid to late January 2000, Tucker did not cut the check until February 17, 2000 and then proceeded to mail the check to Naviant. Thus, Naviant's delivery of the post-natal list on February 23, 2000 was timely. Furthermore, the fact that Tucker waited nearly a month to make the necessary payment, the

(continued...)

provides that Naviant "expect[ed] turnaround time of about 7 business days for delivery of names to Tucker after a list order is made." Although the exact date of order is unclear, Tucker asserts that Naviant breached the Young Families Contract by delivering the "Young Families" list on February 23, 2000, exceeding the seven business day deadline by twelve days.

Parties to a contract may agree to a specific time for performance by including in the contract a specific date for performance or by providing that the time of performance is of the essence. Burgess Steel Products Corp. v. Modern Telecommunications, Inc., 205 A.D.2d 344, 346 (1st Dept. 1994); Sparks v. Stich, 135 A.D.2d 989, 991 (3d Dept. 1987).[21] Here, although Naviant generally agreed that it "expected" delivery of the names to occur in approximately seven days after the placement of the order by Tucker, the contract imposed no specific deadline for performance nor did it provide that the time for performance was of the essence.

In the absence of a provision that time is of the essence or a specific designation of time of performance, performance is due within a reasonable time. United States v. Pendleton, 480 Pa. 107, 113 (1978) ("[W]here time is not of the

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20. (...continued)
condition precedent for delivery of the post natal file, shows that Tucker was not as concerned with the timing of delivery as he purports to be.

21. Larry Tucker testified at trial that he was familiar with the meaning of the legal term of art, "time is of the essence".

essence, the time for completion is not unlimited and must be reasonable under the circumstances."); Savasta v. 470 Newport Associates et al., 82 N.Y.2d 763, 765 (1993) ("When a contract does not specify time of performance, the law implies a reasonable time."); Tupper v. Wade Lupe Construction Co., Inc., 39 Misc.2d 1053, 1056 (Sup. Ct. Schen. Co. 1963) ("In the absence of a provision that time is of the essence, then the rule of reasonable time applies.").

What constitutes reasonable time for performance depends upon the facts and circumstances of the particular case. Savasta, 82 N.Y.2d at 765. Factors the courts look to in making this determination include the parties' conduct and course of dealing, In re Earle Industries, Inc., 88 B.R. 52, 54 (E.D. Pa. 1988), as well as "the subject matter of the contract, the situation of the parties, their intention, what they contemplated at the time the contract was made and the circumstances attending the performance of it." Hills v. Melenbacher, 23 A.D.2d 803, 803 (4th Dept. 1965) (citing A.B. Murray Co., Inc. v. Lidgewood Mfg. Co., 241 N.Y. 455, 459 (1926)).

Here, the Young Families Contract contained a formal "expectation" regarding the turnaround time between order and delivery of approximately seven business days, which, including weekends, could be anywhere between nine and twelve days. Based on this expectation and intention of the parties, approximately seven business days was reasonable time for Naviant's performance under the Young Families Contract. See In re Earle, 88 B.R. at 54

("Where the parties conducted discussions which suggested that production time would be 'approximately 10 weeks,' approximately 10 weeks constitutes reasonable time for performance."); Gasbarre Products, Inc. v. Link Computer Corporation, 98-1228-CD, 1999 WL 1808402, at *4 (Pa. Com. Pl. July 21, 1999) (where defendant set forth its own estimate of twenty weeks to complete its performance, twenty weeks constituted reasonable time for performance); In re U.S. Air Duct Corporation, 38 B.R. 1008, 1015 (N.D.N.Y. 1984) (where parties expected or should have expected payment to be made within forty-five days, forty-five days constituted reasonable time). Furthermore, evidence at trial shows that the prior deliveries of lists under the Young Families Contract from Naviant to Tucker were performed within the seven day time frame. See Sillur Realty Corp. v. Lirco Realty Corp., 205 Misc. 720, 723 (Queens Co. 1954) (course of dealing may be taken into account to determine reasonable time); In re Earle, 88 B.R. at 54 (same).

Given that approximately seven business days was reasonable time for performance, Naviant was obligated to deliver the "Young Families" list of names ordered by Tucker for the March 2000 mailing by February 11, 2000. Naviant did not deliver the list until February 23, 2000, an approximate twelve day delay. Therefore, Naviant's performance was untimely and in material breach of the Young Families Contract.

However, Tucker may not claim that Naviant has not performed timely under the March 2000 mailing of the Young Families Contract because by accepting the list provided by Naviant on

February 23, 2000, Tucker waived the right to demand timely performance. "A party may be deemed to have waived the right to timely performance . . . by accepting performance after expiration of the time limit" provided for in the contract. Franklin Pavlov Construction Co. v. Ultra Roof, Inc., 51 F. Supp. 2d 204, 217 (N.D.N.Y. 1999) (citing Richard Deeves & Son v. Manhattan Life Ins. Co., 195 N.Y. 324, 330 (1909)). See also Selective Builders, Inc. v. Hudson Savings Bank, 137 N.J. Super. 500, 505 (N.J. Sup. Ct. 1975) ("It is well established that one may waive the delay in the performance of a contract whether time be of the essence or not."); Honesdale Ice Co. v. Lake Lodore Improvement Co., 232 Pa. 293, 299 (1911) (same). Therefore, because Tucker accepted Naviant's delayed delivery of the "Young Families" list for the March 2000 mailing, Tucker waived its right to timely delivery and cannot assert Naviant's delay as an excuse for non-payment of the contract price.[22]

c) The Quality of the Names.

Tucker's last complaint concerning Naviant's performance involves the quality of names from the post natal file provided by Naviant to Tucker pursuant to the Letter Agreement, dated January 24, 2001. In December 1999, Tucker asked Naviant if it could obtain this specialized file which was owned by a different corporation,

22. Ordinarily, Tucker would have the remedy for Naviant's untimely delivery by asserting a counterclaim for damages. See Richard Deeves & Son, 95 N.Y. at 330. In this case, because of Tucker's conduct during discovery, the counterclaim has been severed and is not a part of this case.

Experian Inc. In the January 24, 2000 Letter Agreement, Naviant agreed to function as a broker and provide the Experian post natal file to Tucker. On February 23, 2000, after receiving partial payment from Tucker, Naviant provided the list to Tucker, by delivering it to Cornwell.

Tucker argues that because the Letter Agreement states that Naviant expected the post natal file to contain "only 0-24 month old post natal records," Naviant was obligated to provide Tucker with a list of names of families with children between the ages of 0-24 months. However, the Letter Agreement does not contain such an obligation; rather, Naviant's sole obligation under the Letter Agreement was to provide Naviant with the specific list requested by Tucker. Thus, giving effect to the plain and ordinary meaning of an unambiguous contract, the court finds that Naviant is not responsible for the contents of the post natal file as claimed by Tucker. On February 23, 2000, Naviant fully performed this obligation by providing Tucker, through Cornwell, with the specific list which Tucker had requested.

CONCLUSION

Naviant has met its burden of showing that it fully performed all of its obligations under the Young Families Contract and the Letter Agreement: namely, it provided Tucker with the lists of names requested pursuant to the terms of both contracts except as to its untimely delivery of the March 2000 mailing of the "Young Families" list. To the extent that Naviant

failed to deliver the March 2000 list in a timely manner, Tucker waived the breach by accepting performance after the delivery date. Accordingly under the contracts, the court finds that Naviant is entitled to received payment under the terms of the contracts, in the amount of $150,488.56.[23]

An appropriate order follows.

23. This total is derived from the following unpaid invoices for lists of names provided to Tucker from Naviant:

MAILING	**AMOUNT OF NAMES USED**	**PRICE/1,000 NAMES USED**	**TOTAL**
Jan. 2000 “Young Families” Mailing	4,490,301	$7	**$31.457.11**
March 2000 “Young Families” Mailing	6,763,207	$7	**$47,342.45**
March 2000 “Post Natal File” Mailing	65% guarantee: 2,429,098	$48.50 (< 1 million names used)	$117,812 less pre-payment of $46,123 = **$71,689.00**
			$150,488.56 plus interest

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NAVIANT MARKETING SOLUTIONS, INC.,	:	CIVIL ACTION NO. 00-6036
Plaintiff,	:	
v.	:	
LARRY TUCKER, INC.,	:	
Defendant.	:	

ORDER

AND NOW, on this **4th** day of **January, 2002**, it is hereby ordered that a hearing is **SCHEDULED** for **January 30, 2002** at **9:00 a.m.** before the Honorable Eduardo C. Robreno in Courtroom 12A, United States Courthouse, 601 Market Street, Philadelphia, PA.[1] The parties may file written submissions to the court by **January 18, 2002**.

AND IT IS SO ORDERED.

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EDUARDO C. ROBRENO J.

1. At the hearing, the court will consider: a) whether under the court's order of January 4, 2002, judgment shall be entered on plaintiff's claim or stayed pending resolution of defendant's counterclaims; b) how to proceed with defendant's counterclaims, i.e., whether cross motions for summary judgment are appropriate; and c) Naviant's motion for counsel fees.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NAVIANT MARKETING SOLUTIONS, INC.,	:	CIVIL ACTION NO. 00-6036
Plaintiff,	:	
v.	:	
LARRY TUCKER, INC.,	:	
Defendant.	:	

ORDER

AND NOW, on this **4th** day of **January, 2002**, pursuant to Federal Rule of Civil Procedure 52(a), the court **FINDS** that Naviant is entitled to recover payment from Tucker under the terms of the Young Families Contract and the Letter Agreement in the amount of $150,488.56. The effect of this order is **STAYED** pending the January 30, 2002 hearing where the court shall consider whether a longer stay is appropriate.

AND IT IS SO ORDERED.

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EDUARDO C. ROBRENO J.